IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re Estate of JAMES ALLEN HENDRIX, Deceased. In re the Matter of: THE REVOCABLE LIVING TRUST OF JAMES ALLEN HENDRIX, LEON HENDRIX, a married man, Plaintiff, v. JANIE HENDRIX, a married person, Defendant. LEON MORRIS HENDRIX, an individual, Appellant, v. ESTATE OF JAMES ALLEN HENDRIX and JANIE L. HENDRIX, personal representative, <u>Respondent.</u>	)	NOS. 55711-4-I 55782-3-I (Consolidated Cases) DIVISION ONE Unpublished Opinion FILED: July 24, 2006

COLEMAN, J.—Legendary guitarist Jimi Hendrix's father Al Hendrix died in

2002, providing nothing in his will for his son Leon other than one of Jimi's gold records. Al's will left substantial amounts to his daughter Janie and his nephew Robert and also provided for other family members. Leon contested the will on the grounds that, inter alia, it was the product of Janie's undue influence over Al. The trial court found that there were circumstances giving rise to a presumption of undue influence, but that Janie rebutted this presumption. Because Leon failed to prove undue influence by clear, cogent, and convincing evidence, the trial court found the will to be valid and binding. Leon now appeals on many grounds, his primary contention being that the trial court applied the incorrect burden of proof on the undue influence issue.

Leon also brought a claim for interference with an inheritance expectancy, a tort which had not previously been recognized in Washington, and the trial court dismissed the claim on summary judgment. Leon appeals the summary judgment, arguing that this court should extend Washington's recognition of interference with economic expectancies to include inheritance expectancies.

We conclude that the trial court applied the correct burden of proof during the will contest and that none of Leon's other claims warrant reversal, thereby affirming the validity of Al's will. We decline to adopt the tort of interference with an inheritance expectancy on the facts of this case, given that Leon's tort claim arises out of the same nucleus of facts as his will contest and his allegations are duplicative.

FACTS

James Allen Hendrix was born on June 10, 1919, and was known as "Al."[1] Al

[1] Many people involved in this case have Hendrix as their last name, and thus, this opinion refers to Hendrix family members by their first names, with no disrespect

met Lucille Jeter in 1941, when he was 22 and Lucille was 15. Lucille became pregnant and thereafter married Al. Jimi was born in November 1942. Another son, Leon, was born to Lucille in January 1948. Although Al is listed on Leon's birth certificate as his father, Al told many people (including one of his biographers) that Leon was not his biological child, and that Leon's father was an acquaintance of his.

Al and Lucille divorced in 1951, and Al was granted custody of Jimi and Leon. Leon was placed in a series of foster homes, but continued to have contact with Al and Jimi. Al worked as a gardener, supporting his family on modest means. Al had dropped out of school in seventh grade, and his reading comprehension was between a fourth- and seventh-grade level. At 18, Jimi joined the armed services and never lived at home again.

Al married Ayako Jinka, who was known as "June," in 1966. June had five children at the time she married Al, and Al adopted one of these children, Janie. When Al and June married, Janie was five years old. In February 1968, Jimi returned to Seattle to play with his band—the Jimi Hendrix Experience—and met June and Janie for the first time. Jimi died in 1970 without a will, and his estate was administered under New York laws of intestate succession. Lucille had predeceased Jimi, and Al received 100 percent of Jimi's estate. Al continued to work as a gardener after Jimi's death.

From the time of Jimi's death until the early 1990s, Al was represented by attorney Leo Branton, who handled all of Al's business affairs. Branton would provide

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intended.

Al with a $50,000 stipend per year and provide additional money whenever Al requested it. Al was generous with his money and helped his family members pay for cars and down payments on homes, and he also provided Janie, Leon, and others with monthly allowances. Leon and Janie told Al many times that Branton was not paying Al the full amount he was due, but Al dismissed their complaints without investigation. Al was not interested in the complicated administration of Jimi's estate or intellectual property rights and was satisfied with Branton's management.

Leon married in 1974 and he and his wife have six children. Leon is now separated from his wife. Leon has not been steadily employed since 1979, but has worked as an artist and musician intermittently. In 1992, he told Rolling Stone magazine that Al "gave his fortune away out of ignorance. My father has a way of making millionaires out of strangers and paupers out of family." Finding of Fact 39.

Later in 1992, Branton sent a letter to Leon and Janie on behalf of Al asking to purchase their contingent reversionary copyright interests in Jimi's music. Branton explained that, under copyright law, copyrights revert to their original owners after 28 years. He also explained that Al had sold Jimi's copyrights years before in exchange for an annuity and requested that Leon and Janie agree to waive their contingent reversionary rights to Jimi's copyrights in exchange for $300,000 cash and a $700,000 trust for their respective children.

Leon signed the agreement, but Janie refused. Janie retained attorney O. Yale Lewis of the Hendricks & Lewis firm to advise her regarding the agreement. Lewis investigated the agreement and came to believe that Jimi's estate was more valuable

than Branton was representing. Lewis shared this belief with Al, and Al retained Lewis to investigate how Branton had handled Jimi's musical legacy.

Lewis also believed that Al should execute a new will because Branton had drafted his prior will and Branton's trustworthiness was now being investigated. Lewis realized, however, that there might be a conflict of interest if he drafted the will, so he recommended Al contact Jonathan Whetzel about drafting a new will. Al signed a new will in 1993, and the principal beneficiaries of this will were June, Leon, Janie, and Leon and Janie's respective children.

Later in 1993, Al sued Branton, claiming, inter alia, breach of fiduciary duty and fraud. Janie was instrumental in this litigation, and she actively participated in all stages of the suit and its eventual settlement. Because Al had difficulty reading, Janie and others read litigation documents aloud to Al and discussed the contents of the documents with him.

In 1994, Al executed a second will, also drafted by Whetzel. This will left 38 percent of Al's estate to June in a marital trust. Janie received 38 percent also, 19 percent outright and 19 percent in a trust. Leon and his children received 24 percent in trust. On June's death, the remainder of the marital trust was divided between nine people. June's children (other than Janie) received one-seventh each; Al's niece Diane and nephew Robert each received one-seventh; and Al's sister-in-law Pearl Brown and niece Grace Hatcher received one-fourteenth each. This will also contemplated the creation of a family-owned company to hold the Hendrix legacy, and each of the beneficiaries was to receive a share in the company according to his or her percentage

interest in Al's estate. Most of these interests would be owned outright rather than through trusts, and no single heir was to have a controlling interest.

In 1995, Leon was deposed as part of the litigation against Branton. He stated in his deposition that he had been estranged from Al since he was 17 and that he did not care about what Al had provided for him in his will. When asked whether he knew that Al was bequeathing all of Jimi's memorabilia to Janie, Leon expressed relief and stated that he would not have taken care of it if Al had bequeathed it to him.

The litigation against Branton was settled in 1995, with Al's ownership of Jimi's music legacy regained by repurchase for $8.5 million. The settlement was originally contingent upon an agreement to form a joint venture with Music Corporation of America (MCA), whereby MCA would pay Al $40 million for a 50 percent ownership interest in Jimi's music and an exclusive distribution arrangement. Al rejected that venture in favor of a plan that enabled the Hendrix family to retain complete ownership of Jimi's music. Experience Hendrix, LLC, was created as the entity that would own and manage the legacy, and Authentic Hendrix, LLC, was created to own and manage the rights to Jimi's personality and image. Authentic became a wholly-owned subsidiary of Experience. Experience carried a debt burden of more than $26 million due to the cost of reacquiring Jimi's music and the cost of the litigation against Branton.

Later in 1995, Janie contacted Jas Obrecht to arrange for him to co-write a book about Jimi with Al. During Obrecht's first interview with Al, which was conducted in Janie's presence, Obrecht asked Al if Leon was a "planned child." Al looked uncomfortable and said Leon's birth was not planned, and he changed the subject.

Before Obrecht's second interview, Janie explained the questions surrounding Leon's paternity to Obrecht and asked him to pursue the issue further with Al. During a subsequent interview, Al directly addressed the issue of Leon's paternity. Despite the fact that Al did not believe he was Leon's father, he said he always considered Leon his son. Al told Obrecht he respected Janie's ambition and motivation, and he expressed disappointment in Leon's lack of work ethic and drug problems. Although Leon disputes this, the trial court found that Al stated that if Leon wanted money, he could work for it, and there would be no "gimmes" while Al was around. Finding of Fact 79.

Also in 1995, Janie retained Tim Jorstad, a certified public accountant, to perform estate planning services for Al and to consult regarding the tax and accounting considerations created by the Branton litigation. Soon after Janie retained Jorstad, she told him Leon was not Al's biological son. Janie expressed concern to Jorstad that Leon would sell reversionary copyright interests that did not belong to him and cause problems for the estate in the future. At approximately this same time, Janie told Al's nephew Robert that Al was considering eliminating the provisions for Leon in his will. Janie, Robert, and Jorstad, at Jorstad's suggestion, discussed obtaining a blood sample from Al for DNA (deoxyribonucleic acid) testing. Jorstad recommended that Leon's paternity be documented in case of a will contest.

Two weeks after this conversation, Al asked his doctor to take a blood sample "for paternity reasons." This reasoning could refer to Leon's paternity as well as the paternity of Corvina Pritchett, a child born earlier in 1995 to a woman who claimed Al was the father.

In 1996, Al began meeting with Whetzel to prepare a new will. Whetzel conferred with Reed Wasson, the in-house counsel for Experience Hendrix regarding Al's planning and suggestions from Jorstad. Wasson requested that the Stoel Rives law firm assist in the preparation of Al's estate plan. Shortly thereafter, Stoel Rives was retained by Experience Hendrix and Al, Janie, Janie's then-husband Troy Wright, and Robert to investigate and eventually file a lawsuit against the Hendricks & Lewis firm regarding the fees the firm was demanding for its work in the litigation against Branton. Although Stoel Rives represented multiple Hendrix family members on different matters, no conflicts analysis was ever done, no conflicts letters were ever sent, and no waivers were ever signed. The fee litigation with Hendricks & Lewis was eventually settled without a trial.

In the summer of 1996, two of Leon's children, Tina and Alex, were charged with unrelated felony offenses. Henry Lewis of Inland Bonding Company was a friend of Leon's family, and Lewis required $70,000 to cover both Tina and Alex's bail. Leon executed a document that purportedly assigned to Inland Bonding $70,000 from the proceeds of Leon's share as the "heir" of the "Estate of Jimi Hendrix." Finding of Fact 105. Although the Estate of Jimi Hendrix is non-existent, Leon was willing to assign his rights in Jimi's legacy.

In August 1996, George Steers, an estate planning attorney with Stoel Rives, met with Al, Janie, Robert, Wasson, and Whetzel to discuss revising Al's estate plan. Steers suggested forming a family-owned limited partnership to which a minority interest in Experience Hendrix would be transferred during Al's lifetime. Al would be

free to gift partnership interests to various beneficiaries without also giving them a management interest. Al could also obtain valuation discounts for gifts of minority interests. Axis, Inc., a corporation wholly owned by Al, would be the general partner of the family limited partnership. Al would also gift shares in Axis.

In November 1996, Al executed a third will drafted by Whetzel. It was similar to the previous will except that it recognized the formation of Experience Hendrix and its related companies and the birth of Corvina Pritchett. This will was intended to serve as an interim will while a new, more comprehensive estate plan was crafted. Al, Janie, Robert, Wasson, and Steers met later that month and agreed that the plan Steers suggested in August would be put into effect. Whetzel had been present at the August meeting, but was not involved in the November meeting and performed no further estate planning services for Al.

During the time that Steers' plan was being discussed, Leon hired Oscar Desper to represent him in an effort to renegotiate his reversionary rights contract with Al. Leon alleged Al had breached the original contract by failing to fund the $700,000 trust for his children. Leon and Desper threatened to go to the media and MCA if their demands were not met. Leon was aware that discussions with MCA were occurring at that time and that they could be affected by adverse publicity. Leon offered to settle the dispute over the validity of the reversionary rights agreement for $3 million.

Al responded to Leon's demands in a letter drafted by Wasson. The letter rejected Leon's demand for three reasons: (1) The amount Leon requested exceeded the entire surplus cash currently projected by Experience Hendrix for the rest of the

decade; (2) the 1994 assignment agreement remained valid and binding; and (3) Al did not believe that giving more money to Leon and some of his children would improve their lives given their lifestyles, criminal records, and drug histories. Leon responded with a letter drafted by Desper, stating that it was not true that $3 million exceeded Experience Hendrix's cash flow, that the 1994 agreement was not valid or binding, and that Leon's lifestyle is not the primary issue. Desper drafted another letter shortly thereafter proposing an alternative settlement.

Al and Leon reached an agreement, and one provision of this agreement required Leon to undergo a 90-day inpatient drug treatment program in January 1997. Shortly after Leon arrived at the treatment program, he attempted to renegotiate the length of his stay there to shorten it to 45 days. After Al declined to reduce the length of Leon's stay, Leon was dismissed from the program because of a conflict with a drug counselor.

In February 1997, Al met with Steers and Wasson to discuss his estate plan. Al told them he did not want to give interests in the companies to Leon or his children, but was leaning toward leaving Leon cash outright. The following month, Al met with Steers and Wasson again and stated that he did not want to bequest anything to Leon until further notice. A few days after that conversation, 49.4 percent of Al's interest in Experience Hendrix and Authentic Hendrix (half of Al's net worth) was transferred to Bodacious Hendrix, a newly formed family limited partnership. Bodacious was created to allow Al to share beneficial interests in the legacy during his lifetime.

In March 1997, irrevocable trusts were created for Janie, Robert, and the other

beneficiaries of the earlier marital trust. Janie and Robert were named the trustees of their own trusts, and co-trustees for the other trusts. At the end of the month, Al transferred his entire interest in Bodacious to the trusts. Al transferred to each of the separate trusts a specific percentage interest in Bodacious.

In April 1997, Al signed a codicil to his will, which bequeathed all his stock in Axis to Janie, increased Corvina Pritchett's share from 5 percent to 10 percent if it were proved she was his daughter, increased the marital trust's share to 50 percent of the remaining estate, bequeathed the contingent reversionary rights Al had purchased from Leon to Janie, and bequeathed one of Jimi's gold records to Leon but nothing more. Between the inter vivos gifts of March 1997 and the April 1997 codicil, Janie's share of Al's estate increased from 38 percent to 47.72 percent, Robert's share increased from 5.43 percent to 17.17 percent, and Leon's share dropped from 24 percent to zero.

Immediately after this codicil was signed, Stoel Rives began revising Al's will so that his estate would be administered and distributed through a revocable living trust. In February 1998, Al signed the living trust agreement and an accompanying pour-over will. Al was named the trustee, and Janie and Robert were named successor trustees. All assets in Al's name at the time of his death were left to the living trust. The signing of the living trust and the pour-over will was videotaped. Al acknowledged on the video his understanding that no provision was being made for Leon, and Al said he was "very satisfied" with the documents. Finding of Fact 137. Steers testified that before the videotaping, Steers reviewed the documents with Al and discussed Al's concerns about Leon. Steers testified that Al stated Leon had had his chances.

In July 1998, Al transferred his remaining interests in Experience Hendrix and Authentic Hendrix to the living trust. Al also executed a will identical to the February 1998 will to correct a technical defect. In August 1998, Al assigned his interest in the Axis, Purple Haze, Hendrix Records, and Stay Experienced companies to the living trust.

In September 2001, Al executed a durable power of attorney naming Janie as his attorney in fact. In April 2002, Al died after a long illness. On the day Al died, Leon's lawyers sent a letter to Wasson threatening legal action related to Al's personal property and estate. Four months later, Leon filed four lawsuits against Janie and the estate. In addition to his challenges to Al's will and living trust based on fraud, lack of capacity, undue influence, mistake, and misrepresentation, Leon filed a tort suit against Janie for interference with an inheritance expectancy. The will contest and tort suits were consolidated during discovery but not trial, and the will contest trial was held first.

The parties conducted extensive discovery for almost two years, and the will contest bench trial spanned eight weeks. The trial court dismissed Leon's claim as to the will contest,[2] and months later dismissed Leon's tort claim by summary judgment. Leon now appeals both the dismissal of the will contest on the undue influence claim and the tort claim, for a variety of reasons discussed below.

ANALYSIS

Standards of Review

[2] The trial court also entered separate findings and conclusions regarding the administration of Al's trusts, which have not been appealed and are therefore not discussed here.

Leon assigns error to more than 50 of the trial court's 225 findings of fact. Leon also assigns error to ten of the court's conclusions of law. We review Leon's challenges to the trial court's findings of fact for substantial evidence. Bartel v. Zucktriegel, 112 Wn. App. 55, 62–63, 47 P.3d 581 (2002). "'Substantial evidence is that quantum sufficient to persuade a fair-minded, rational person of the truth of the declared premise.'" Bartel, 112 Wn. App. at 62 (quoting Hanson v. Estell, 100 Wn. App. 281, 286, 997 P.2d 426 (2000)). "'As an appellate tribunal, we are not entitled to weigh either the evidence or the credibility of witnesses even though we may disagree with the trial court in either regard.'" Bartel, 112 Wn. App. at 62 (quoting In re Welfare of Sego, 82 Wn.2d 736, 739–40, 513 P.2d 831 (1973)). "[W]here there is conflicting evidence, the court needs only to determine whether the evidence viewed most favorable to respondent supports the challenged finding." In re Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). If we conclude that the findings of fact are supported by substantial evidence, we review the conclusions of law to determine whether they are supported by those findings of fact. Holland v. Boeing Co., 90 Wn.2d 384, 390, 583 P.2d 621 (1978).

Leon cites In re Estate of Bowers, 132 Wn. App. 334, 131 P.3d 916 (2006), and In re Estate of Black, 153 Wn.2d 152, 161, 102 P.3d 796 (2004), for the proposition that an appellate court reviews probate proceedings de novo. But in neither case was the review de novo because it was a probate proceeding. The Bowers trial court's findings were based exclusively on a written record and Black was a review of a summary judgment. See In re Estate of Nelson, 85 Wn.2d 602, 605–06, 537 P.2d 765

(1975) (stating that decisions based on declarations, affidavits, and written documents are reviewed de novo) and Failor's Pharmacy V. Dep't of Soc. & Health Servs., 125 Wn.2d 488, 493, 886 P.2d 147 (1994) (stating that an appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment). To the extent that those cases note in dicta earlier cases holding that probate proceedings are equitable and therefore reviewed de novo, the earlier cases were decided prior to the merging of law and equity. See In re Estate of Mayer, 43 Wn.2d 258, 264, 260 P.2d 888 (1953) ("Since the adoption of Rule on Appeal 43 (34A Wn. 2d 47), effective January 2, 1951, there has been no distinction between our method of reviewing the record in equity cases and in law cases tried to the court."). Therefore, because the trial court's findings of fact here were made after a full trial and not on a written record, we review them for substantial evidence.

Leon also assigns error to various evidentiary rulings made by the trial court. We review evidentiary rulings for abuse of discretion. Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435 (1994). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." Havens, 124 Wn.2d at 168.

Leon also challenges the trial court's dismissal of his tortious interference claim on summary judgment. We perform the same inquiry as the trial court, reviewing the order de novo. Sheehan v. Transit Auth., 155 Wn.2d 790, 796–97, 123 P.3d 88 (2005). Summary judgment is appropriate only if the pleadings, affidavits, depositions and filed admissions establish that there is no genuine issue as to any material fact and the

moving party is entitled to judgment as a matter of law. CR 56(c).

Presumption of Undue Influence

Leon argues that the trial court correctly found that there was enough evidence in this case to raise a presumption of undue influence but that the court weakened this presumption by focusing only on evidence supporting the first three Dean factors and then applied the incorrect burden of proof for rebuttal evidence.

Both parties agree that Dean v. Jordan, 194 Wash. 661, 79 P.2d 331 (1938) established the test by which a will challenger proves that a will is the product of undue influence. "To vitiate a will there must be something more than mere influence. There must have been an undue influence at the time of the testamentary act, which interfered with the free will of the testator and prevented the exercise of judgment and choice." Dean, 194 Wash. at 671. The evidence to establish undue influence must be clear, cogent, and convincing. Dean, 194 Wash. at 669. The burden on a will contestant to prove undue influence is thus daunting, but the Dean case also establishes a presumption of undue influence and explains how it can be rebutted:

> [C]ertain facts and circumstances bearing upon the execution of a will may be of such nature and force as to raise a suspicion, varying in its strength, against the validity of the testamentary instrument. The most important of such facts are (1) that the beneficiary occupied a fiduciary or confidential relation to the testator; (2) that the beneficiary actively participated in the preparation or procurement of the will; and (3) that the beneficiary received an unusually or unnaturally large part of the estate. Added to these may be other considerations, such as the age or condition of health and mental vigor of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity for exerting an undue influence, and the naturalness or unnaturalness of the will. The weight of any of such facts will, of course, vary according to the circumstances of the particular case. Any one of them may, and variously should, appeal to the vigilance of the court and cause it to proceed with caution and carefully to scrutinize the evidence offered to establish the will.

> The combination of facts shown by the evidence in a particular case may be of such suspicious nature as to raise a presumption of fraud or undue influence and, in the absence of rebuttal evidence, may even be sufficient to overthrow the will. In re Beck's Estate, 79 Wash. 331, 140 Pac. 340 [1914].
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> Considering the matter in the light of these rules, we believe and hold that the facts in this case did raise a presumption of undue influence, and that the presumption was of such strength as to impose upon the proponent the duty to come forward with evidence sufficient at least to balance the scales and restore the equilibrium of evidence touching the validity of the will.

Dean, 194 Wash. at 671–72. The Dean presumption is thus not a conclusive presumption, but evidence raising the presumption may be sufficient to overthrow a will if there is no rebuttal evidence. Dean does not specify the quantum of proof (whether preponderance of the evidence or some higher or lower standard) that is required to rebut the presumption, but courts applying the Dean test have provided guidance on the various burdens of proof applied in a will contest.

In Foster v. Brady, 198 Wash. 13, 19, 86 P.2d 760 (1939), decided the year after Dean, the Supreme Court stated:

> This court has also recognized that the circumstances surrounding the execution of a will may be so suspicious and suggestive as to raise a presumption of undue influence, which may be overcome only by clear and satisfactory evidence that no such influence was exerted. In re Beck's Estate, 79 Wash. 331, 140 Pac. 340 [1914].

(Emphasis added.) In Foster, because the court concluded the evidence of undue influence was clear, cogent, and convincing, the Dean presumption was not applied. Because the Dean presumption was not applied, the "clear and satisfactory evidence" language is arguably dicta.

Two years after Foster was decided, the Supreme Court commented negatively upon Foster:

> We also stated, in [Foster], that ordinarily undue influence can be established only by circumstantial evidence, and that the circumstances surrounding the execution of a will may be so suspicious and suggestive as to raise a presumption of undue influence, which may be overcome only by clear and satisfactory evidence that no such influence was exerted. [Foster] seems to rely upon the cases of Dean v. Jordan, supra, and In re Beck's Estate, 79 Wash. 331, 140 Pac. 340, to sustain the statement that, where the circumstances surrounding the execution of the will are so suspicious as to create a presumption, that presumption can be overcome only by clear and satisfactory evidence. We seriously doubt if either of the cited cases goes as far as above stated. The Jordan case states:
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> "The combination of facts shown by the evidence in a particular case may be of such suspicious nature as to raise a presumption of fraud or undue influence and, in the absence of rebuttal evidence, may even be sufficient to overthrow the will," (Italics ours.) citing In re Beck's Estate, 79 Wash. 331, 140 Pac. 340, to sustain the above statement.

In re Estate of Schafer, 8 Wn.2d 517, 521, 113 P.2d 41 (1941). Schafer clarifies that while Foster overstated the quantum of evidence required to rebut the presumption of undue influence, the Dean framework correctly establishes how the presumption functions.

The Supreme Court further clarified the Dean presumption a year after Schafer:

> It is true, of course, that in the very nature of things a charge of undue influence can rarely be proved by direct evidence and must be established, if at all, by circumstantial evidence. [Citations omitted.] Mere suspicion of undue influence is not enough [citations omitted], although we have recognized that in a particular case the facts may be of such a suspicious nature as to raise a presumption of fraud or undue influence, and that unless this presumption is met by evidence to the contrary, it may suffice to overthrow the will. Dean v. Jordan, supra; Foster v. Brady, supra; In re Schafer's Estate, supra. We are not convinced that, by the standards established in those cases, a presumption of fraud or undue influence arose here, but even if it be assumed that it did and that as a consequence the burden of going forward with the evidence shifted to appellant, we are still convinced that the evidence to the contrary is not only sufficient to rebut the presumption, but actually goes further and by a preponderance establishes the absence of fraud or undue influence.

In re Estate of Bottger, 14 Wn.2d 676. 703–04, 129 P.2d 518 (1942). In the last sentence of that quote, the court makes it clear that rebuttal evidence of a quantum sufficient to rebut the presumption is typically less than a preponderance of the evidence. In Bottger, the will proponent not only rebutted the presumption but went further to establish the absence of fraud or undue influence by a preponderance.

While the Dean presumption has been explained in many cases, those cases have also emphasized that the existence of the presumption does not shift the ultimate burden of proof from the will challenger:

> The existence of the presumption imposes upon the proponents "the duty to come forward with evidence sufficient at least to balance the scales and restore the equilibrium of evidence touching the validity of the will"; it does not, however, relieve the contestants from the duty of establishing their contention by clear, cogent, and convincing evidence."

In re Estate of Smith, 68 Wn.2d 145, 154, 411 P.2d 879 (1966) (emphasis in original). Thus, when certain factors are present in a will contest, a presumption of undue influence is raised and the will proponent has the burden to present evidence to restore the balance. But in order for a will to be overcome for reasons of undue influence, the will contestant still has the ultimate burden to prove that undue influence existed by clear, cogent, and convincing evidence. Although Leon assigns error to the court's Conclusion of Law 20, it is not inconsistent with the statement of the rule in Smith above: "If undue influence is presumed, the proponent of the will is not required to produce clear, cogent, or convincing evidence in response or to prove the lack of undue influence." This is a correct statement of the law, and we thus conclude that the court correctly applied the law to the facts of this case.

Leon relies on Foster to argue that Janie should have been required to rebut the presumption with "clear and satisfactory" evidence (which he argues is the equivalent of clear, cogent, and convincing evidence), and thus, the court erred in concluding that "sufficient evidence to restore equilibrium" was enough. But as explained above, later courts explained that "clear and satisfactory" is assuredly not the same as clear, cogent, and convincing, and suggest that it is actually a lesser burden than preponderance of the evidence. When viewed as a whole, the case law indicates that to restore the equilibrium of evidence of a will's validity, less than clear, cogent, and convincing evidence is required.

The trial court found that there was enough evidence to raise the presumption of undue influence, but that Janie successfully rebutted the presumption "by providing evidence of ample countervailing justifications for Al not to have provided for Leon and Leon's children in his will." Finding of Fact 173. This finding summarizes the court's reasoning in finding that the presumption had been rebutted, and other findings of fact specifically address evidence that rebuts the presumption, demonstrating that the court's finding was supported by substantial evidence. Leon argues that whether countervailing justifications exist for eliminating any bequest to Leon does not have any bearing on whether Janie exerted undue influence.

Leon challenges many of the court's findings relating to the justifications for Al's not providing for Leon in his will, claiming that these justifications essentially represent the court's "reasonable doubt" that Al's will was the result of undue influence. Brief of Appellant, at 76 n.37. Leon thus argues it was erroneous for the court to make findings

as to the reasons why Al would have disinherited Leon rather than focusing exclusively on the evidence (or lack of evidence) of Janie's undue influence. But the court's findings as to the reasons that could explain why Al disinherited Leon go to the naturalness of the will, one of the factors mentioned in Dean that can determine whether a will resulted from undue influence. In many situations, a will disinheriting a testator's child could be considered unnatural, but Janie presented substantial evidence to demonstrate that Al's will was natural under the unique circumstances of the Hendrix family. The court also considered justifications for Al's will as part of its review of all of the facts surrounding this case, and those justifications provided context to Al's decision-making process. The relationship between Al and Leon was described from many points of view at trial, some of which conflicted. The trial court's findings thus reflect what it found to be credible facts during the trial, and we review those findings for substantial evidence.

There is evidence in the record that Al met with his estate planning attorneys alone many times, and the attorneys explained the estate plan to Al numerous times. Al signed his will on videotape, acknowledging that he was not leaving a bequest to Leon other than Jimi's gold record and that he was very satisfied with his will. Janie was not present during this signing and had not been present during most of the will drafting meetings. All of these provide substantial evidence to support the court's conclusion that Janie successfully rebutted the presumption of undue influence.

In arguing that the trial court applied only a weakened presumption, Leon asks this court to re-weigh the evidence presented at trial in his favor. But, as stated

above, we will not engage in any re-weighing of the evidence, as the weight and credibility of evidence are issues within the sole discretion of the trial court. See Bartel, 112 Wn. App. at 62. Because there is substantial evidence to support the trial court's findings and conclusions that Janie rebutted the presumption and Leon did not meet his ultimate burden of proof, we affirm the court's conclusion that Al's will was not the product of undue influence.

Inter Vivos Gifts

Leon contends that the trial court should have placed the burden upon Janie and Robert, as recipients of inter vivos gifts from Al totaling half of his net worth in March 1997, to prove that the gifts were not the result of undue influence under McCutcheon v. Brownfield, 2 Wn. App. 348, 467 P.2d 868 (1970). Below, Leon argued that because he would have received 24 percent of the amount transferred to Janie and Robert under an older estate plan, the trial court should award Leon that same amount out of the gifts given to Janie and Robert in 1997.

If the recipient of an inter vivos gift has a confidential relationship with the donor, a presumption of undue influence arises and the recipient has the burden to prove the gift was intended and not the result of undue influence. McCutcheon, 2 Wn. App. 348. The burden is on the recipient because courts want to protect donors from giving away assets that may be needed during the donor's life (as opposed to gifts given at death via will). White v. White, 33 Wn. App. 364, 370–71, 655 P.2d 1173 (1982). The donee's burden of proof is clear, cogent, and convincing evidence. Pedersen v. Bibioff, 64 Wn. App. 710, 720, 828 P.2d 1113 (1992). Regardless of whether the burden of

proof at trial is preponderance of the evidence; clear, cogent, and convincing evidence; or proof beyond a reasonable doubt, a reviewing court will not disturb a trial court's findings of fact if they are supported by substantial evidence. Gerimonte v. Case, 42 Wn. App. 611, 616 n.2, 712 P.2d 876 (1986).

Here, the trial court stated that the McCutcheon rule shifting the burden to Janie did not apply to the facts of this case because "[t]he issue here is not the inter vivos gifts made to Janie, but rather the absence of a bequest to Leon and his children." Finding of Fact 24. Leon frames the issue this way on appeal as well, arguing that "[t]he issue is not whether Al intended to make any gift to Janie and Robert, but whether there is clear cogent and convincing evidence that his decision to gift Leon's share to them was free from undue influence." Brief of Appellant, at 81–82.

In McCutcheon and its line of cases, the donee is required to prove that the donor made the gift "'freely, voluntarily, and with a full understanding of the facts.'" McCutcheon, 2 Wn. App. at 356 (quoting 28 Am. Jur. 2d Gifts § 106 (1968)). See also White, 33 Wn. App. at 368 (stating that the donee must prove the donor intended to make the gift and intended to permanently relinquish the ownership of the subject of the gift). The trial court specifically concluded that "clear, cogent, and convincing evidence establishes that Al Hendrix understood the inter vivos gifts he made to Janie and that he made the gifts freely, voluntarily, and with a full understanding of the facts." Conclusion of Law 25. Thus, although it is doubtful that McCutcheon applies here for the reasons stated by the trial court, the court's conclusions demonstrate that even if McCutcheon did apply, Leon's claim would fail.

The trial court's conclusion is supported by substantial evidence. There was a significant amount of testimony from Steers about the purpose of the inter vivos gifts as part of Al's estate plan, primarily to lower the estate tax payable upon his death. The inter vivos gifts "prefunded" the bequests made in his will and, thus, were part of Al's comprehensive estate plan designed by Steers and executed by Al. Because substantial evidence supports the trial court's conclusion that Al's inter vivos gifts were not the result of undue influence but the product of reasoned decisions concerning the structure of his estate plan, we affirm the trial court's conclusion.

Confidential Relationship

The trial court found that Al's nephew Robert was not in a confidential relationship with Al, for purposes of determining whether McCutcheon applied. Leon argues that this finding was not supported by substantial evidence.

A confidential relationship is defined in McCutcheon as existing "'between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind.'" McCutcheon, 2 Wn. App. at 357 (quoting Restatement of Restitution § 166(d) (1937)). "The essential elements of a confidential relationship are (1) that the parent reposes some special confidence in the child's advice and 2) that the child purports to advise with his parent's interests in mind." Lewis v. Estate of Lewis, 45 Wn. App. 387, 391, 725 P.2d 644 (1986).

If Robert had been found to have been in a confidential relationship with Al, Robert would have had to prove by clear, cogent, and convincing evidence that Al's inter vivos gifts to him were not the product of undue influence—but only if Leon had

claimed that Robert exerted undue influence over Al. Leon made no such claim, but claimed only that Janie exerted undue influence over Al. Thus, we need not determine whether Robert had a confidential relationship with Al because even if the court erred in finding that he did not, it would have no effect on the issues in the case.

Even if we were to review the finding, it would be affirmed because it is supported by substantial evidence. Robert was involved with Al's companies and served as co-trustee (with Janie) for most of Al's trusts, but there was no evidence that Robert advised Al directly or that Al considered Robert indispensable. Robert's business experience made it natural for Al to include him in the family companies, but there was no demonstration that Al had placed special confidence in him. All of this provides substantial evidence to support the trial court's finding, and we do not disturb the finding.

Weight of George Steers' Testimony

Leon argues that four of the trial court's findings regarding George Steers' testimony are not supported by substantial evidence and that the trial court gave improper weight to Steers' testimony without addressing its discrepancies. As stated above, we will not engage in a re-weighing of evidence (see Bartel, 112 Wn. App. at 62), but will individually review the disputed findings of fact for substantial evidence.

Finding of Fact 185 states: "Steers was able to ascertain Al's true desires without the interference of outside influence." This finding is supported by Steers' testimony that he conversed with Al at length to determine his wishes for estate planning and that he observed nothing that indicated Al was being pressured by others.

We do not disturb this finding because it is supported by substantial evidence.

Finding of Fact 186 states: "There is no persuasive evidence that Steers was unable to ascertain Al's true desires." Leon argues that this finding demonstrates that the trial court placed the burden on Leon to prove that Steers was unable to provide independent counsel to Al, when the court should have required Janie to prove that Steers provided independent representation. Steers testified as to the methods and practices he used to determine Al's desires for his estate plan—including a series of questions designed to elicit Al's intent as to his estate plan and diagrams drawn to explain to Al how his estate plan worked and interacted with estate taxes. There was also testimony that Al was concerned about ensuring that the Hendrix family—not creditors or companies or the government—benefited from Jimi's legacy, and the estate plan drafted by Steers is consistent with that wish.

Despite Leon's argument that Steers should have asked Al to explain why he was not providing for Leon or his children in his will, an estate planning attorney is not required to ask or make a record of a client's reasoning for his or her will provisions, although it may be prudent to do so. But even if Steers had asked Al to justify his decision, Al's answer would not have established whether he had been unduly influenced to not provide for Leon. The trial court's inquiry was whether Al's will represented his intent, not why certain bequests were not made. All of the testimony described above provides substantial evidence to support the court's finding that Steers was able to ascertain Al's wishes, and therefore, we do not disturb this finding.

Finding of Fact 187 states: "Outside influences did not interfere with Steers'

representation of Al throughout the estate planning process." Steers testified about meeting with Al by himself or with Al and Wasson. Steers testified that Janie was not present at any of his meetings with Al where there was any discussion of beneficiaries, including the signing of his will. This testimony is substantial evidence supporting the trial court's finding, and therefore, we do not disturb the finding.

Finding of Fact 188 states: "The degree of attention paid by Stoel Rives to conflicts of interest did not have any material effect on Steers' representation of Al." The trial court had commented during trial on the fact that Stoel Rives did not pay much attention to potential conflicts. But Steers testified that he did not believe a conflict of interest existed between the firm's representation of Janie (in her capacity as a guarantor of a disputed fee agreement, to which the primary parties were Al and Experience Hendrix) and Steers' estate planning work for Al. Steers testified that he believed that his firm's separate representation of Al and Janie in unrelated matters did not amount to a conflict of interest because the interests involved were not adverse—the representation of Janie in the fee dispute matter was unrelated to Al's estate planning. Steers' testimony provides substantial evidence to support the finding and we do not disturb it.

Thus, because there is substantial evidence in the record to support each of these findings of fact, we do not disturb them and Leon's claim here fails.

Admission of Reed Wasson letter

Leon argues that the court also erred in admitting a letter Reed Wasson drafted on behalf of Al, in response to Leon's request for renegotiation of the reversionary

rights agreement. The letter was admitted over Leon's hearsay objection, on the ground that it went to Al's state of mind. Leon argues that the trial court abused its discretion in admitting the letter because it was drafted by Wasson and thus not probative as to Al's state of mind.

Because the issues in this case necessarily involved a large amount of hearsay testimony, the court decided that many of Al's statements (including those represented in the Wasson letter) were admissible not as proof of the matter asserted, but only to demonstrate Al's state of mind. The trial court's memorandum opinion quotes at length from the letter Wasson drafted for Al to explain why he was rejecting Leon's demand for renegotiation of the reversionary rights agreement. Wasson testified that he spoke with Al before writing the letter and that Al made statements consistent with what was written in the letter. The letter was admitted not as proof that Leon would spend money on drugs or that Leon's children would not improve their lives if they were given more money, but to demonstrate Al's state of mind as he negotiated with Leon.

The letter does reflect Al's state of mind because it explains why he rejected Leon's offer and illuminates the process by which a compromise was reached between Al and Leon. Even though it was drafted by Wasson, Wasson testified that he spoke with Al before drafting the letter and that it reflected their conversation. We conclude that the trial court did not abuse its discretion in admitting the letter.

Even if it were erroneously admitted, the state of mind attributed to Al in the letter was corroborated by other findings not challenged on appeal. See Findings of Fact 103, 104, 117, 118, and 120. Therefore, any error in admitting the letter was

harmless. See Primm v. Wockner, 56 Wn.2d, 215, 218, 351 P.2d 933 (1960) ("If hearsay was admitted, it was harmless error, inasmuch as the trial court's findings are supported by competent evidence.").

Barbara Thomas's Testimony

One of Al's friends, Barbara Thomas, heard reports of the trial in the media and contacted Leon during the trial to see if she could assist his case. Thomas's identity as a possible witness was disclosed immediately, and Thomas's deposition was taken during a two-week adjournment of the trial. Thomas's trial testimony was limited (per a motion in limine) to two meetings she had with Al before his final estate plan was executed and a phone call after it was executed. Leon argues that the trial court abused its discretion in placing these limitations on Thomas's testimony, particularly because the trial court's findings reflect negative inferences about Thomas's credibility due to the limitations.

The trial court's decision to limit Thomas's testimony to her last three encounters with Al was on relevance grounds. Although Thomas had known Al in earlier years, it was within the trial court's discretion to decide that only her interactions with Al after 1995 were probative as to Janie's undue influence on Al. The question of whether evidence is relevant lies within the broad discretion of the trial court. Davidson v. Municipality of Metro. Seattle, 43 Wn. App. 569, 574, 719 P.2d 569 (1986). Testimony from Thomas regarding interactions with Al before 1995 would not have been probative or material to the issue of whether Janie exerted undue influence over Al in the making of his final will, and thus, the court's limitation on Thomas's testimony was not an abuse

of discretion.

And because we do not review credibility findings, we do not consider Leon's argument that the trial court erred in finding that Thomas's testimony was not credible in its Findings of Fact 209. Leon assigns error to Finding of Fact 210, which states that Al generally kept his personal life to himself. Leon asserts that the trial court should not have found that Thomas's testimony that Al confided in her to be not credible. In the first place, we will not review credibility findings of the trial court. Moreover, the testimony of other friends of Al that Al generally did not like to discuss personal matters—particularly his estate plan—provides substantial evidence to support this credibility determination. Thus, we do not disturb this finding.

Leon also challenges Finding of Fact 211, where the court found that, at most, Thomas's testimony did not establish Janie's undue, but only that Janie did not want Al to provide for Leon in his will. Leon argues that the trial court should have found that Thomas's testimony established Janie's undue influence over Al. But the trial court is not required to accept the inferences Leon drew from Thomas's testimony. The inferences the court did draw from Thomas's testimony—that Janie did not want Al to provide for Leon in his will—were reasonable and supported by the testimony. When viewing the evidence most favorable to Janie, Finding of Fact 211 is supported by substantial evidence, and therefore, we do not disturb this finding. See Lint, 135 Wn.2d at 532.

Tina Hendrix's Testimony

Leon argues that the trial court's finding that Tina's testimony regarding a

Bumbershoot event was not credible was erroneous because the only conflicting testimony was from Janie, and a photograph from the event corroborates Tina's testimony.

Tina testified that Janie attempted to exclude Leon's children from Hendrix family events and specifically described a Bumbershoot concert event honoring Jimi where the family was gathering to take a picture and Janie tried to push Tina and her brother Alex aside. Tina testified that even though Janie tried to exclude them, they stayed in the picture. The photograph was admitted and depicted Tina and Alex standing with the family next to Al. The trial court found that Tina's testimony that she and Alex were "pushed aside by Janie Hendrix at the 1995 Bumbershoot event is not credible," because Tina and Alex remained in the photograph with the family. Finding of Fact 197.

We will not re-weigh the trial court's credibility determination here. But even if the court misconstrued Tina's testimony and should have found her to be credible because her testimony was actually consistent with the photograph, no prejudice resulted because Janie's efforts to exclude Tina and Alex at this event are irrelevant as to whether Janie exerted undue influence on Al in making his will. See Maicke v. RDH, Inc., 37 Wn. App. 750, 754, 683 P.2d 227 (1984) ("[E]rror is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.") (alteration in original). Without a showing of how this finding prejudiced Leon, we do not disturb it because there is substantial evidence in the record to support the court's overall findings that Janie did not exert undue

influence.

Tortious Interference with an Inheritance Expectancy

Leon argues that the trial court erred in dismissing his claim for a new tort because tortious interference with inheritance/gift expectancy is a logical extension of Washington's already recognized causes of action for tortious interference with economic expectancies. Furthermore, Leon argues that he did not have an opportunity to have a "full airing of issues" in the will contest, and thus, he is not precluded from bringing a tort action either by res judicata or collateral estoppel.

No Washington case has adopted the tort of interference with an inheritance expectancy, although other states have recognized this tort or extended the tort of interference with a business expectancy to include inheritance expectancy. Janie claims that even in jurisdictions that recognize the tort, Leon would not be permitted to pursue the tort remedy after unsuccessfully contesting the will. Leon points to cases in two jurisdictions that "permit tortious interference claims irrespective of whether relief is available in a will contest." Reply Brief of Appellant, at 41.

Leon first cites Frohwein v. Haesemeyer, 264 N.W.2d 792 (Iowa 1978). While it is true that this case does not expressly limit the tort's application to situations where relief is not available in a will contest, there was no will contest possible in that case because the statute of limitations had run. The court therefore did not address whether this tort would have been available if an earlier will contest had been unsuccessful.

Leon also cites Allen v. Hall, 974 P.2d 199 (Ore. 1999), but again this case does not expressly extend the tort to situations where relief in a will contest was possible. In

that case, the plaintiffs were arguing that the defendants had interfered with their inheritance expectancy by preventing the testator from making a new will. Because the plaintiffs' action did not challenge a will but in fact alleged that the testator was prevented from making a will, a will contest would not have provided relief for the Allen plaintiffs. Thus, the court did not address whether this tort would have been available if an earlier will contest had been unsuccessful. Leon has not cited any authority that would expressly permit a plaintiff in his position to bring a cause of action for tortious interference with an inheritance expectancy, and the cases he has cited to support his position are of dubious applicability to his position because neither involved a case where the tort claimant had been previously unsuccessful in a will contest.

The only Washington case to consider this tort is Hadley v. Cowan, 60 Wn. App. 433, 804 P.2d 1271 (1991). In this case, the appellants had filed a will contest alleging lack of testamentary capacity, but agreed to settle and dismiss their will contest in exchange for a $30,000 contribution to each of their trusts. After the settlement, the appellants then filed a tort action against the will beneficiaries, alleging inter alia tortious interference in the form of undue influence, duress, fraud, abuse of confidence, and substitution of the beneficiaries' will for the testator's will. The beneficiaries alleged that the dismissal of the will contest acted as res judicata to preclude the appellants' claims, but the appellants argued that the dismissal could not act as res judicata because it was a proceeding in rem. The court held that "although the probate action was ostensibly in rem, it may have res judicata effect in a later in personam tort action." Hadley 60 Wn. App. at 440. The court went on to further explain why the

dismissal of the will contest acted as res judicata:

> The allegations of undue influence, abuse of confidence, fraud, and substitution of respondents' will for the deceased's will all are of a single "transactional nucleus of facts" that could and should have been determined in the probate challenge. The damages resulting from the alleged conduct in the present case and in the probate challenge are substantially the same and are intimately related in time, origin, and motivation, because they arise out of the same interactions between the deceased and the respondents. It is also obvious that the claims in the present proceedings would have constituted a convenient trial unit in the probate proceeding.

Hadley, 60 Wn. App. at 442–43. Leon argues that this case is not a general rejection of the tort, but only a rejection of the use of the tort after a settlement. But the reasoning quoted above is not limited to a situation where a will contest is settled; the same reasoning should apply to a fully litigated will contest. It is undeniable that Leon's tort claim against Janie arose from the same nucleus of facts considered in the will contest, and that the interests of judicial economy argue against re-litigating these claims.

Leon also argues that we should adopt this tort to provide a remedy with a lower burden of proof than the clear, cogent, and convincing evidence burden in a will contest. But, even if we were to adopt the tort, we are not persuaded that a lower burden would apply. Because this tort would have essentially the same effect as a will contest—overriding a will—the same elevated burden of proof should be applied in either cause of action. Among jurisdictions that have adopted the tort, it appears that will contests and tort claims typically have the same burdens of proof. In some jurisdictions, preponderance of the evidence is the burden of proof for both will contests

and tort claims, while other jurisdictions apply an elevated burden to both will contests and tort claims. See, e.g., Minton v. Sackett, 671 N.E.2d 160, 163 (Ind. Ct. App. 1996) (same non-elevated burden of proof applied to both tort claim and will contest); Harris v. Kritzik, 166 480 N.W.2d 514, 517 (Wis. 1992) (elevated burden of proof applied to both will contest and the dispositive element of the tort claim). Leon has cited no jurisdiction that applies an elevated burden to a will contest and a preponderance burden to a tortious interference with an inheritance expectancy claim. This argument does not persuade us to adopt the tort here.

Thus, on these facts—where the potential tort claimant has unsuccessfully pursued a will contest remedy—we decline to adopt the tort of interference with an inheritance expectancy. Because Leon has cited no persuasive authority to support his position that an unsuccessful will contestant may bring a tortious interference claim, we decline to recognize the tort of interference with inheritance expectancy in Washington on the facts of this case.

Attorney Fees

Janie requests attorney fees under RCW 11.96A.150, based on the fact that she has incurred substantial expense on appeal and that Al's beneficiaries should not be forced to incur that expense in an appeal without substantial merit. Fees were not awarded below and we likewise decline to award fees here because although we did not find Leon's arguments persuasive, we do not find his appeal to be devoid of merit.

For the foregoing reasons, we affirm.

Coleman, J.

WE CONCUR:

Schindler, ACJ

Cox, J.